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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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WINIFRED JIAU,
Plaintiff,
v.
RANDY L. TEWS,
Defendant.

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Case No. [13-cv-04231-YGR](#) (PR)

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

I. INTRODUCTION

This action originally was filed by Winifred Jiau, a former federal prisoner, as a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Plaintiff, who at the time she filed the instant action was an inmate in the custody of the Federal Bureau of Prisons (“BOP”) at the Federal Corrections Institute in Dublin, California (“FCI-Dublin”), alleged that she was unlawfully denied her request for transfer to a Residential Re-entry Center (“RRC”)¹ on December 3, 2012. The Court notes that Plaintiff was eventually placed in an RRC around a year later, on December 23, 2013. Dkt. 48 at 10.² She has since been released from BOP custody, as of June 2014. *Id.* at 1.

In an Order dated August 15, 2017, the instant action was converted into a *pro se* action under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Dkt. 38. She has been granted leave to proceed *in forma pauperis*. Dkt. 39.

The operative complaint in this action is the second amended complaint in which she names Defendant Randy L. Tews, who is the warden at FCI-Dublin. Dkt. 48 at 2. Plaintiff seeks monetary damages. *Id.* at 20.

Before the Court is Defendant's motion for judgment on the pleadings pursuant to Federal

¹ Some RRCs are colloquially known as halfway houses.

² Page number citations refer to those assigned by the Court's electronic case management filing system and not those assigned by the parties.

1 Rule of Civil Procedure 12(c), or alternatively, for summary judgment pursuant to Rule 56. Dkt.
2 60. As the Court considers matters outside the pleadings, Defendant's pending dispositive motion
3 will be treated as one for summary judgment.³ *See* Fed. R. Civ. P. 12(b). Plaintiff opposes the
4 motion, and Defendant has filed a reply. Dkts. 62, 63. For the reasons discussed below, the Court
5 GRANTS Defendant's motion for summary judgment.

6 **II. BACKGROUND**

7 **A. Authority of BOP To Place an Inmate in an RRC**

8 The BOP has the authority, under 18 U.S.C. § 3621(b), to designate the location of an
9 inmate's imprisonment. 18 U.S.C. § 3621(b). Because this action involves the alleged denial of
10 Plaintiff's request to be transferred to an RRC, the Court includes a brief background on the
11 authority of the BOP to place an inmate in an RRC, as taken from the Court's July 10, 2018 Order
12 of Service. *See* Dkt. 50.

13 Prior to December 13, 2002, the BOP's policy was to exercise its
14 discretion in allowing prisoners to serve part or all of their
15 imprisonment in an RRC. *Rodriguez v. Smith*, 541 F.3d 1180, 1182
16 (9th Cir. 2008). As of December 13, 2002, the Department of Justice
17 Office of Legal Counsel ended that practice by issuing a legal opinion
18 that section 3621(b) does not authorize inmate placement in an RRC
19 for an entire term, for the reason that such placement does not
20 constitute imprisonment. *Id.* In the light of the above-referenced
21 opinion, the BOP, on December 20, 2002, changed its policy, by
22 limiting an inmate's eligibility for placement in an RRC to the shorter
of either six months or the final ten percent of the inmate's sentence.
Id. Subsequently, that policy was invalidated by the First and Eighth
Circuits, which found the policy failed to recognize the BOP's
discretion to transfer inmates at any time to an RRC. *Id.* In response,
the BOP decided to "exercise its discretion categorically to limit
inmates' community confinement to the last ten percent of the prison
sentence being served, not to exceed six months." *Id.* (quoting 69
Fed. Reg. 51213). In 2005, that BOP rule was codified at 28 C.F.R.
§§ 570.20 and 570.21. *Id.*

23 On April 9, 2008, the Second Chance Act was signed into law,
24 authorizing the BOP to consider placing inmates in an RRC for up to
25 the final twelve months of their sentence. 18 U.S.C. § 3624. On
26 September 4, 2008, the Ninth Circuit decided *Rodriguez*, *see supra*,
holding the rules published by the BOP at 28 C.F.R. §§ 570.20 and
570.21 conflicted with the Congressional intent of 18 U.S.C.
§ 3621(b), which sets forth five factors the BOP must consider when

28 ³ Because the Court is treating Defendant's motion as one for summary judgment, the
Court need not address the alternative grounds for judgment on the pleadings.

1 making placement and transfer decisions. *See Rodriguez*, 541 F.3d at
2 1186. As determined by the Ninth Circuit, inmates must be
3 considered for RRC placement based on the five factors of section
3621(b) and consequently, the BOP cannot reference 28 C.F.R.
§§ 570.20 and 570.21 in considering an inmate for RRC placement.
Id. at 1189.

4 *Id.* at 2-3.

5 **B. Factual Background⁴**

6 **1. Plaintiff's Version**

7 The following Plaintiff's version of the factual background is derived from the allegations
8 in her second amended complaint. *See* Dkt. 48. Plaintiff claims that “[o]n or about October 4,
9 2011, [she] was sentenced to a forty-eight-month term of incarceration for the offense of security
10 fraud.” *Id.* at 3. On December 19, 2011, she arrived at FCI-Dublin to complete her sentence. *Id.*
11 She claims that in August 2012, she was “classified by the [BOP] Central Monitoring Case . . . as
12 ‘community custody.’” *Id.* Plaintiff claims that, according to the Second Chance Act, she would
13 have become eligible for up to twelve-month pre-release placement in an RRC. *Id.* Plaintiff
14 claims that she believed her eligibility to serve her sentence in an RRC started on or about June
15 2013. *Id.* Thus, she requested to be transferred to an RRC on or about December 2012. *Id.* She
16 claims that on December 3, 2012, her request “was denied within [Defendant’s] authority.” *Id.* at
17 3, 5; Dkt. 1, Ex. 4 (Defendant’s May 30, 2013 Response to Request for Administrative Remedy).

18 **2. Defendant's Version**

19 The following is Defendant's version of the factual background is taken from the
20 Defendant's dispositive motion. *See* Dkt. 60 at 11-15.

21 **A. Plaintiff Served A 48-Month Sentence At A Minimum-
22 Security Prison**

23 In June 2011, Plaintiff was convicted of conspiracy to commit

24 ⁴ This Order contains a few acronyms. Here, in one place, they are:

BOP	Bureau of Prisons
FCI-Dublin	Federal Corrections Institute in Dublin, California
IFRP	Inmate Financial Responsibility Program
PS	Program Statement
RDAP	Residential Drug Abuse Treatment Program
RRC	Residential Re-entry Center

1 securities fraud and wire fraud crimes. Dkt. 48 (Compl.) at 1. She
2 served the majority of her 48-month prison sentence at the Satellite
3 Prison Camp (SPC) at Dublin, which is a part of FCI-Dublin. *Id.* FCI-
4 Dublin is a minimum security facility for female offenders with an
5 adjacent minimum security satellite camp for female offenders.
6 Declaration of Randy S. Tews (“Tews Decl.”) ¶ 4. At the time of
7 Plaintiff’s incarceration, Defendant served as Warden over the
8 approximately 1400 inmates at the SPC and FCI-Dublin. *Id.* ¶ 5.

9

10 **B. Plaintiff’s Unit Team Made An RRC Determination Based On**
11 **Five Statutorily-Required Factors And Other Permissible**
12 **Considerations**

13 In December 2012, having been classified as an inmate in
14 “community custody,” Compl. at 3, ¶ 2, which is a lower security
15 level, *id.*, Plaintiff requested a review of her eligibility for a twelve-
16 month pre-release placement in a residential re-entry center (“RRC”),
17 or halfway house, to assist her with positive reintegration into the
18 community. *Id.* ¶ 3; *see also* Tews Decl. ¶ 11 (describing the RRC
19 program). Per 18 U.S.C. § 3624(c), “The Director of the Bureau of
20 Prisons *shall, to the extent practicable*, ensure that a prisoner serving
21 a term of imprisonment *spends a portion* of the final months of that
22 term (not to exceed 12 months), under conditions that will afford the
23 prisoner a reasonable opportunity to adjust to and prepare for the
24 reentry for that prisoner into the community.” 18 U.S.C. § 3624(c)
25 (emphasis added). In determining a particular inmate’s placement,
26 the inmate’s Unit Team works closely with the inmate and is
27 responsible for, among many other things, recommending the
28 appropriate length of RRC placement for the inmate. Tews Decl. at
¶¶ 13-14, 20. In making this recommendation, the team must consider
the five factors set forth in 18 U.S.C. § 3621(b). *See, e.g.*, Compl. at
Ex. 1, at p. 11 (noting that the Unit Team considered the five statutory
factors in Plaintiff’s case). The factors are: (1) the resources of the
facility contemplated; (2) the nature and circumstances of the offense;
(3) the history and characteristics of the prisoner; (4) any statement
by the court that imposed the sentence—(A) concerning the purposes
for which the sentence to imprisonment was determined to be
warranted; or (B) recommending a type of penal or correctional
facility as appropriate; and (5) any pertinent policy statement issued
by the Sentencing Commission pursuant to section 994(a)(2) of title
28.

29 However, the Unit Team may consider other factors. *See, e.g.*,
30 *Rodriguez v. Smith* 541 F.3d 1180, 1187 (9th Cir. 2009) (recognizing
31 that the five factors are not exhaustive); *see also* Tews Decl. ¶¶ 24-
32 26 and Attachments C-F (referencing BOP guidance regarding all of
33 the factors that can be considered in making an RRC determination).
34 Section 3624(c) specifically requires that the BOP make
35 individualized assessments of the custody needs of each inmate under
36 § 3621(b), providing: The Director of the Bureau of Prisons shall
37 issue regulations pursuant to this subsection not later than 90 days
38 after the date of the enactment of the Second Chance Act of 2007,
39 which shall ensure that placement in a community correctional
40 facility by the Bureau of prisons is—(A) conducted in a manner
41 consistent with section 3621(b) of this title; (B) *determined on an*
42 *individual basis*; and (C) of sufficient duration to provide the greatest

1 likelihood of successful reintegration into the community. 18 U.S.C.
2 § 3624(c) (emphasis added).

3 Utilizing and applying the statutory requirements and BOP guidance,
4 Plaintiff's Unit Team determined in July 2013 that a six-month RRC
5 placement beginning on December 23, 2013 was appropriate. Compl.
6 at Ex. 1 at 11. To reach the conclusion, the team applied the five
7 required statutory factors. *Id.* (stating all five factors considered).
8 The Unit Team also took into account Plaintiff's low-risk of
9 recidivism based on her lack of criminal history; her family support
10 and financial resources; the loss of her professional license; her
general job skills; her planned residence with a friend upon release;
her failure to complete the Residential Drug Abuse Treatment
Program ("RDAP"); and Plaintiff's refusal to participate in the Inmate
Financial Responsibility Program ("IFRP"). *See id.* Because the
RRC assessment is, by statute, individualized, the Unit Team did not
compare Plaintiff to other inmates; indeed, each inmate on the Unit
Team's caseload was considered based solely on the application of
the five statutory factors to her as well as any additional factors
specific to her. Tews Decl. at ¶ 30.

11 The IFRP is a *voluntary* program intended to encourage inmates to
12 meet their financial obligations. *See* 28 C.F.R. § 545.10; *see also* BOP
13 Program Statement ("PS") 5380.08, Inmate Financial Responsibility
14 Program (August 15, 2005)(available at <http://www.bop.gov>); *see*
15 also Compl. at 14, ¶ 25 (stating that IFRP is a voluntary program).
16 Financial obligations include fines, restitution, and outstanding
17 judgments. 28 C.F.R. § 545.11(a)(1)-(5); PS 5380.08, pp. 4-7. When
18 an inmate arrives at an institution, a Unit Team assesses the inmate's
19 obligations and prepares a financial plan. *See* 28 C.F.R. § 545.10-
20 11(b); PS 5380.08, at 7-9. Under the financial plan, the inmate then
21 makes payments both from outside resources and funds acquired at
22 the institution. *See* 28 C.F.R. § 545.11(b); PS 5380.08, at 7. The
payments are determined with reference to, among other things,
23 monthly pay from the inmate's work assignments. 28 C.F.R.
24 § 545.11(b). As the IFRP is a voluntary program, inmates are free to
25 decline to participate in IFRP, but the failure either to participate or
26 to comply with a financial plan may result in limitations on furloughs,
27 pay, work detail, commissary spending, housing status, and
placement in community-based programs. *See id.* § 545.11(d). At
Attachment H, at pp. 13-14.

28 Defendant reviewed the RRC recommendation made by the Unit
Team for Plaintiff, Tews Decl. ¶ 21 & Attachment A, and Plaintiff's
May 15, 2013 progress report, *id.* ¶ 22 & Attachment B. Concurring
with the team, Defendant found the assessment reasonable, if not
generous in his experience, because the team had considered the five
factors set forth in 18 U.S.C. § 3624(b) in making its recommendation
for a six-month RRC placement and had properly considered other
factors. *Id.* ¶ 27.

B. Plaintiff Was Given A Common Work Assignment

Plaintiff was assigned the job of “orderly” in July 2013. *See, e.g.*, Compl. at 8 (citing Ex. 6). All federal inmates are required to work with the exception of those who for security, education, or medical reasons are unable to do so. *See Inmate Work and Performance*, 28 C.F.R. pt 545, subpt. C; Program Statement 5251.06, *Inmate Work and Performance Pay*. Pursuant to 18 U.S.C. § 4125(a), federal inmates may be made available to perform public works financed wholly or in part by funds appropriated by Congress. It is common for inmates at SPC-Dublin to be assigned public works projects at the United States Army’s Parks Reserve Forces Training Area, which is adjacent to FCI-Dublin, as Plaintiff was. Tews Decl. at ¶¶ 43, 44. Compl. at ¶ 16. Work assignments can be affected by the failure to participate in the IFRP. Tews Decl. ¶ 34 and Attachment H (SCP-Dublin handbook) at pp. 13-14. Defendant played no role in inmate work assignments. Tews Decl. ¶ 45.

D. Plaintiff's Medical Condition Did Not Warrant A Change In Work Assignment

FCI-Dublin offers health services to inmates and Plaintiff utilized those services. *See, e.g.*, Compl. at Ex. 2 (health records). The operation of the Health Services Department at FCI-Dublin was directly supervised by the Health Services Administrator. Medical care was supervised by the Clinical Director, who was also a health care provider. These staff members reported to the Associate Warden for Operations, who in turn reported to Defendant. Tews Decl. ¶ 47. Defendant had no direct involvement with Plaintiff's medical care and was not aware of Plaintiff's health condition until he received a request for administrative remedy from Plaintiff dated August 20, 2013. *Id.* ¶¶ 41, 48. Indeed, Defendant had no access to Plaintiff's, or any other inmates, medical records, which are contained in an electronic records systems to which he had no access. *Id.*

On August 21, 2012, Plaintiff's BOP medical records show that she experienced chest pain, and was referred by a Camp Officer to Health Services where it was recorded that her heart was beating quickly and she reported that she was experiencing "crushing" pain. Compl. at Ex. 2 at 2; Ex. 3 at Compl. at p. 19. Records indicate that on July 19, 2013, the institution's Utilization Review Committee met to discuss and ultimately approved a cardiology consultation that had been requested by Plaintiff. *Id.* at Ex. 3. On July 12, 2013, Plaintiff told her work supervisor that she could not perform her work duties because of her heart condition. Tews Decl. Attachment I at 1. She later received an incident report for and was later found guilty of a "Code 311" disciplinary violation for failing to perform work and making a false statement to her supervisor. *Id.* Her punishment was loss of phone privileges for 15 days. *Id.* at 3. In Defendant's response to Plaintiff's August 20, 2013 request for administrative remedy following the incident, Defendant stated that based on his review, Plaintiff's discipline was warranted because there was no indication from the Health Services clinician that "[Plaintiff] could not or should not report to your work detail at the Army, Camps Park." Tews Decl., Attachment I at 1. According to Defendant's response, when Plaintiff told her work supervisor of her heart condition, Plaintiff "caused

1 enough alarm" that her supervisor "did not feel comfortable having
2 you on the detail at that time." *Id.* However, since Health Services
3 had not given Plaintiff any medical restrictions, ". . . it was determined
you failed to perform your work when you took it upon yourself to
give alarming information in regard to the condition of your heart."
Id.

4 *Id.*

5 **C. Procedural Background**

6 The record shows that Plaintiff had previously filed and fully litigated a habeas petition
7 that, like the instant complaint, pertained to the alleged unlawful denial of her request to transfer to
8 an RRC with twelve months remaining on her prison sentence. *See* Dkt. 38 at 1. She has also
9 utilized the BOP's Administrative Remedy Program, which is available to all inmates, to
10 challenge her RRC determination. *See* 28 C.F.R. §§ 542.10-542.19; *see, e.g.*, Dkt. 1-1 at 29; Dkt.
11 1, Ex. 4 (Defendant's May 30, 2013 Response to Request for Administrative Remedy).

12 Specifically, as mentioned above, this action originally was filed by as a *pro se* petition for
13 a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Plaintiff sought an Order directing the BOP
14 to transfer her immediately to an RRC and requiring the BOP to consider the relevant statutory
15 factors to determine the appropriateness of such a transfer. *See* Dkt. 1 at 1-2, 6. The Court noted
16 that since this action was initially filed, Plaintiff obtained the relief she requested: transfer to an
17 RRC. *See* Dkt. 19 at 2 (citing Dkt. 9). The Court further noted that Plaintiff had since been
18 released from BOP custody. *Id.*

19 In an Order dated August 28, 2014, the Court granted Respondent's motion to dismiss the
20 petition as moot. Because Plaintiff's release from BOP custody was a result more favorable than
21 the relief sought in the petition, the Court found that there was no longer a live controversy before
22 it. Dkt. 23 at 2 (citing *Mitchell v. Dupnik*, 75 F.3d 517, 528 (9th Cir. 1996)). Also in its August
23 28, 2014 Order, the Court denied Plaintiff's motion to convert her petition to a *Bivens* action upon
24 determining that she filed the instant action prior to exhausting administrative remedies. *Id.*
25 (citing *Porter v. Nussle*, 534 U.S. 516, 524 (2002)). Thereafter, this case was reopened when the
26 Ninth Circuit reversed this Court's ruling denying Plaintiff's motion to convert her petition to a
27 *Bivens* action. *See* Dkt. 27. Because the record was not developed fully, the Ninth Circuit stated
28 that it could not determine "whether the district court properly denied the motion to convert based

1 on [Plaintiff's] failure to exhaust." *Id.* at 2-3. The Ninth Circuit thus vacated "the portion of the
2 judgment denying [Plaintiff's] motion to convert and remand[ed] for further proceedings,
3 including, if necessary, further development of the record as to whether the government sought an
4 extension [to file a response to the grievance] and whether [Plaintiff] received notice of an
5 extension." *Id.* at 3. The Ninth Circuit issued its mandate. Dkt. 31. The Court then directed
6 Respondent to provide the aforementioned further briefing and also to file a renewed motion to
7 deny Plaintiff's motion to convert her petition to a *Bivens* action "if Respondent believe[d] that it
8 is clear from the record that Plaintiff filed the instant action prior to exhausting administrative
9 remedies." *See* Dkt. 35. Respondent filed a response indicating he no longer opposed Plaintiff's
10 request on the ground that she failed to exhaust her administrative remedies but opposed the
11 request on other grounds. Dkt. 36. Plaintiff filed an opposition to Respondent's response. Dkt.
12 37. Plaintiff also moved for leave to proceed *in forma pauperis* ("IFP"), which the Court
13 construed to be her notice of intent to prosecute this action as a *Bivens* action with the higher filing
14 fee of \$400.00. Dkt. 33.

15 In an Order dated August 15, 2017, the Court granted Plaintiff's request to convert her
16 petition into a *Bivens* action and granted her an opportunity to amend her claims relating to the
17 following: Due Process, Equal Protection, and Ex Post Facto Clauses.⁵ Dkt. 38. On the same
18 date, the Court also granted her motion for leave to proceed IFP in a separate written Order. Dkt.
19 39.

20 On January 19, 2018, the Court issued its Order Granting Plaintiff's Motion for Leave to
21 File Second Amended Complaint, and it noted that Plaintiff shall refer to the Court's August 15,
22 2017 Order "which indicate[d] that 'although she has been given the opportunity to amend, it is
23 not for the purposes of adding new claims.'" Dkt. 46 at 2 (citing Dkt. 38 at 14). Plaintiff was
24 specifically instructed that if she "wishe[d] to raise new claims, she may do so in *a separate new*
25

26 ⁵ Plaintiff had also raised an Eighth Amendment claim based on the denial of her RRC
27 transfer request and a First Amendment claim that such a denial was the result of retaliation by
28 Defendant due to her previous lawsuits. Dkt. 48 at 16-19. However, the Court dismissed both
claims with prejudice in its August 15, 2017 Order. *See* Dkt. 38 at 8-9, 13-14. The Court also
specified that it granted Plaintiff "an opportunity to amend [her] claims relating to the following:
Due Process, Equal Protection, and Ex Post Facto Clauses." *Id.* at 14.

1 *Bivens action.” Id.* (emphasis in original).

2 On February 2, 2018, Plaintiff filed her second amended complaint against Defendant,
3 which is the operative complaint in this action. Dkt. 48.

4 On July 10, 2018, this Court issued an Order of Service finding three of Plaintiff’s claims
5 cognizable and determined that they could proceed against Defendant. Dkt. 50. Specifically, the
6 Court found that when it liberally construed the claims in her second amended complaint, Plaintiff
7 alleged a violation of Due Process, Equal Protection, and Ex Post Facto Clauses. *Id.* at 3-4.
8 Again, central to all three claims is the denial of her request to be transferred to an RRC for the
9 remaining twelve months of her term of incarceration. In particular, the Court first found
10 cognizable Plaintiff’s allegations that Defendant violated the Due Process Clause by depriving her
11 of a liberty interest created by 18 U.S.C. §§ 3621(b) and 3624(c), the statutory provisions
12 governing the BOP’s housing determinations, by “fail[ing] to conduct [her] pre-release review by
13 utilizing [the] five-factor analysis mandated by 18 U.S.C. § 3621(b) properly,” and that the BOP
14 should have exercised its authority under 18 U.S.C. § 3624(c) to authorize a transfer to an RRC.
15 *Id.* at 4-6. The Court further found cognizable Plaintiff’s allegation that Defendant violated the Ex
16 Post Facto Clause by “continuing to deduct restitution payments” under the voluntary IFRP while
17 allegedly compelling her to participate in the program by using it as a reason to deny her request to
18 be transferred to the RRC. *Id.* at 6. Finally, the Court found cognizable Plaintiff’s third claim is
19 an alleged violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S.
20 Constitution under a “class of one” theory for Defendant’s allegedly invidiously dissimilar
21 treatment of Plaintiff as compared to other allegedly similarly situated women who also sought
22 transfers to RRCs without a rational basis. *See id.* at 6-8; *see also id.* at 1, 4-8.

23 On September 10, 2018, Defendant filed an answer to the second amended complaint.
24 Dkt. 55.

25 On December 12, 2018, Defendant filed the instant motion for judgment on the pleadings,
26 or in the alternative, summary judgment. Dkt. 60. Again, as mentioned above, because the Court
27 considers matters outside the pleadings, the motion will be treated as one for summary judgment.
28 *See Fed. R. Civ. P. 12(b).* On January 17, 2019, Plaintiff filed her opposition. Dkt. 62. On

1 January 31, 2019, Defendant filed a reply. Dkt. 63.

2 **III. DISCUSSION**

3 **A. Legal Standard for Summary Judgment**

4 Federal Rule of Civil Procedure 56 provides that a party may move for summary judgment
5 on some or all of the claims or defenses presented in an action. Fed. R. Civ. P. 56(a)(1). “The
6 court shall grant summary judgment if the movant shows that there is no genuine dispute as to any
7 material fact and the movant is entitled to judgment as a matter of law.” *Id.*; *see Anderson v.*
8 *Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party has the burden of
9 establishing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S.
10 317, 323 (1986); Fed. R. Civ. P. 56(c)(1)(A) (requiring citation to “particular parts of materials in
11 the record”). The court is only concerned with disputes over material facts and “[f]actual disputes
12 that are irrelevant or unnecessary will not be counted.” *Anderson*, 477 U.S. at 248. It is not the
13 task of the court to scour the record in search of a genuine issue of triable fact. *Keenan v. Allan*,
14 91 F.3d 1275, 1279 (9th Cir. 1996). If the moving party meets this initial burden, the burden then
15 shifts to the non-moving party to present specific facts showing that there is a genuine issue for
16 trial. *See Celotex*, 477 U.S. at 324; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475
17 U.S. 574, 586-87 (1986). If the nonmoving party fails to make this showing, “the moving party is
18 entitled to a judgment as a matter of law.” *Celotex*, 477 U.S. at 323.

19 A district court may consider only admissible evidence in ruling on a motion for summary
20 judgment. *See Fed. R. Civ. P. 56(e); Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002).

21 In support of the motion for summary judgment, Defendant has submitted his own
22 declaration and attached exhibits relating to the decision involving Plaintiff’s RRC placement
23 request and her subsequent request for administrative remedy. Dkts. 60-2, 60-3, 60-4, 60-5, 60-6,
24 60-7, 60-8, 60-9, 60-10, 60-11. Because the aforementioned documents have been properly
25 authenticated pursuant to Federal Rule of Evidence 803(6), the Court will consider these
26 documents in connection with Defendant’s motion for summary judgment.

27
28

1 Plaintiff has verified her second amended complaint⁶ and declaration in support of her
2 opposition⁷ by signing them under penalty of perjury. Dkt. 48 at 20; Dkt. 62-1 at 9. However,
3 Plaintiff has not verified her opposition because she failed to sign either under penalty of perjury.
4 See Dkt. 62 at 10. The Court may treat the allegations in the verified second amended complaint
5 and declaration as opposing affidavits to the extent such allegations are based on Plaintiff's
6 personal knowledge and set forth specific facts admissible in evidence. See *Schroeder v.*
7 *McDonald*, 55 F.3d 454, 460 & nn.10-11 (9th Cir. 1995) (treating a plaintiff's verified complaint
8 as opposing affidavit where, even though verification not in conformity with 28 U.S.C. § 1746, he
9 stated under penalty of perjury that contents were true and correct, and allegations were not based
10 purely on his belief but on his personal knowledge).

11 **B. Analysis of Merits**

12 **1. Due Process Claim**

13 In her second amended complaint, Plaintiff asserts that Defendant violated the Due Process
14 Clause by refusing her RRC transfer request. Dkt. 48 at 12-13

15 The Due Process Clause protects against the deprivation of liberty without due process of
16 law. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). In order to invoke the protection of the Due
17 Process Clause, a plaintiff must first establish the existence of a liberty interest for which the
18 protection is sought. *Id.* Liberty interests may arise from the Due Process Clause itself, or from
19 an expectation or interest created by prison regulations. *Id.* The Due Process Clause itself does
20 not confer on inmates a liberty interest in avoiding "more adverse conditions of confinement." *Id.*
21 The existence of a liberty interest created by prison regulations is determined by focusing on the
22

23 ⁶ Attached to Plaintiff's second amended complaint are exhibits relating to the decision
24 involving her RRC placement request that are mostly similar to those attached to Defendant's
25 declaration. See Dkt. 48-1 at 21-36; Dkts. 60-3, 60-4, 60-5, 60-6, 60-7, 60-8, 60-9, 60-10, 60-11.
26 As these documents are evidence already considered in connection with the summary judgment
motion, the Court will also consider the same documents submitted by Plaintiff. Plaintiff has also
submitted various progress reports and health services clinical encounter administrative notes, to
which Defendants do not object. Dkt. 48-1 at 2-19.

27 ⁷ In her declaration, Plaintiff references her First and Eighth Amendment claims. See Pl.
28 Decl. ¶¶ 10, 17. However, as mentioned above, in this Court's August 15, 2017 Order, it
dismissed both claims with prejudice. See Dkt. 38 at 8-9, 13-14. Therefore, the Court need not
address any arguments as to her previously dismissed First and Eighth Amendment claims.

1 nature of the deprivation. *Sandin v. Conner*, 515 U.S. 472, 481-84 (1995). Such liberty interests
2 are “generally limited to freedom from restraint which . . . imposes atypical and significant
3 hardship on the inmate in relation to the ordinary incidents of prison life.” *Id.* at 484; *Myron v.*
4 *Terhune*, 476 F.3d 716, 718 (9th Cir. 2007). The Fifth Amendment itself provides no liberty
5 interest in a prisoner’s desired location of incarceration. As mentioned above, the law is clear that
6 a prisoner has no constitutional right to be placed in any particular correctional facility, even
7 though the degree of confinement in one facility may be quite different from that in another. *See*
8 *Olim v. Wakinekona*, 461 U.S. 238, 244-45 (1983); *Meachum v. Fano*, 427 U.S. 215, 224-25
9 (1976); *see also Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976) (holding that discretionary
10 determinations regarding conditions of confinement do not create due process rights).

11 In its July 10, 2018 Order of Service, the Court determined that, in her second amended
12 complaint, Plaintiff identified the sources of her liberty interest: 18 U.S.C. § 3621(b) and 18
13 U.S.C. § 3624(c). Dkt. 50 at 5 (citing Dkt. 48 at 12-13). Specifically, Plaintiff alleged that
14 Defendant denied her right to due process by “fail[ing] to conduct [her] pre-release review by
15 utilizing [the] five-factor analysis mandated by 18 U.S.C. § 3621(b) properly,” dkt. 48 at 12, and
16 that the BOP should have exercised its authority granted in 18 U.S.C. § 3624(c) to authorize her
17 transfer to an RRC, *id.* at 3-4, 12-13. Plaintiff further alleged that Defendant relied on “false
18 information” and classified her as having a “low chance of recidivism” in order to exclude her
19 from being granted the 12-month RRC placement. *Id.* at 5. She alleged that, to the contrary, she
20 has a *high* chance of recidivism given her lack of family support, financial resources, general job
21 skills, and other factors. *Id.* Thus, she claimed that Defendant “supervised others conducting [the]
22 RRC determination by [creating] false information and [a falsified] recidivism risk level to
23 exclude her from getting [the] 12-month RRC placement.” *Id.* Plaintiff further claimed that other
24 similarly situated inmates or inmates in better financial and health conditions were allowed
25 placement in the RRC. *Id.* Plaintiff alleged that she suffered from a “worsening cardiac problem
26 and serious depression” as her heart failed on August 21, 2012, at which time she was rushed to
27 the emergency room. *Id.* She claimed that her “poor health condition limited her employment
28 opportunities,” and she “requested more time and medical assistance to stabilize her condition for

1 a 12-month RRC [placement].” *Id.* at 6. She added that she “submitted her extraordinary reentry
2 needs to Defendant and his office in multiple written requests between December 2012 and April
3 2013.” *Id.* Finally, Plaintiff alleges that Defendant also assigned her a “hard labor” position in a
4 “janitorial [position] in [a] U.S. Army base” in August 2013 despite her medical condition, and
5 after the army supervisor dismissed her due to her heart condition she was “punished” with two
6 disciplinary charges. *Id.* at 11.

7 The Court finds that Plaintiff’s claim fails as a matter of law under the *Sandin* analysis
8 because the statutory provisions Plaintiff cites as the basis for her liberty interest—18 U.S.C.
9 §§ 3621(b) and 3624(c)—do not create a restraint on her freedom that imposes an atypical or
10 significant hardship on prison life because the aforementioned provisions’ purpose is to afford
11 prisoners an opportunity to reintegrate into life outside of prison. As explained above, the BOP
12 has the authority, under 18 U.S.C. § 3621(b), to designate the location of an inmate’s
13 imprisonment. *Rodriguez*, 541 F.3d at 1182. Inmates must be considered for RRC placement
14 based on the five factors set forth in section 3621(b), and the BOP may not reference 28 C.F.R.
15 §§ 570.20 and 570.21 in considering an inmate for RRC placement. *Id.* at 1189. Under 18 U.S.C.
16 § 3624(c), the BOP has an affirmative duty to consider placing the inmate in a community RRC or
17 similar pre-release alternative towards the end of the inmate’s prison term. *Id.* at 1184. However,
18 the BOP has the discretion to transfer inmates to an RRC at any time. *Id.* at 1182, 1185-89
19 (holding that BOP regulations categorically excluding RRC placement of inmates with more than
20 ten percent of their sentences remaining violates Congressional intent that BOP must consider
21 several factors to determine placement under section 3621(b)). Specifically, section 3624(c)
22 provides discretionary language regarding custody conditions, and states that the Director of BOP
23 “shall, to the extent practicable,” place a prisoner in “conditions that will help adjust and prepare
24 for reentry into the community,” which “may include a community correctional facility” for a
25 “portion” of a prisoner’s final months of a prison term. 18 U.S.C. § 3624(c). Again, the Court
26 finds that this provision does not impose “atypical or significant hardship” on a prisoner because
27 its purpose is to afford prisoners an opportunity to reintegrate into life outside of prison, which is
28 not a hardship.

1 As to Plaintiff's claim that she did not receive "proper" five factor consideration of the
2 statutory criteria set forth in section 3621(b), Defendant argues that such a contention "does not
3 appear to be relevant in the context of her due process claim." Dkt. 60 at 17 fn. 2. The Court
4 agrees. Plaintiff was evaluated for classification and designation by the BOP in July 2013. Dkt.
5 In finding appropriate and assigning Plaintiff to a six-month (as opposed to a twelve-month) RRC
6 placement beginning December 23, 2013, BOP considered the five required statutory factors as
7 well as the other information required by BOP's classification, designation and re-designation
8 procedures, which are consistent with the statutory authority contained in section 3621(b).
9 Further, federal courts lack jurisdiction to review "any determination, decision, or order" made
10 pursuant to 18 U.S.C. §§ 3621, 3624. *Reeb v. Thomas*, 636 F.3d 1224, 1227 (9th Cir. 2011) ("The
11 plain language of [18 U.S.C. § 3625] specifies that the judicial review provisions of the
12 [Administrative Procedure Act], 5 U.S.C. §§ 701-706, do not apply to 'any determination,
13 decision, or order' made pursuant to 18 U.S.C. §§ 3621-3624."). Thus, in essence, the statute does
14 not confer on Plaintiff a right to what she believes to be "proper" consideration of those five
15 factors.

16 Additionally, Defendant argues that to the extent Plaintiff is claiming that the Unit Team's
17 application of sections 3621(b) and 3624(c) in her case, which limited Plaintiff's RRC placement
18 to six months (instead of twelve) constituted "atypical or significant hardship," she
19 "misapprehends the law." Dkt. 60 at 25. Thus:

20 The Unit Team's decision to keep Plaintiff in the same, minimum-
21 security prison environment with ample services during a portion of
22 her last year in confinement was not a departure from the ordinary
23 course of Plaintiff's prison life and thus was neither atypical nor
24 significant hardship. That Plaintiff was assigned to serve as an
25 "orderly" does not alter this conclusion. Indeed, per 28 C.F.R. subpt.
26 545, subpt. C; Program Statement 5251.06, Inmate Work and
27 Performance Pay, all federal inmates are required to work excepting
certain reasons, and typical jobs include orderly. Tews Decl. at ¶ 38.
Thus, there was nothing atypical about the assignment. As to
plaintiff's claim that this was "hard labor" due to her health condition,
Compl. at 12, 13, 17, 18, the record contains no evidence that the
prison's Health Services' clinicians believed that any of her health
conditions required any limitations on her work assignments, thus
there was no significant hardship.

28 *Id.* Again, the Court agrees with Defendant. Plaintiff has not presented, nor has the Court found,

any caselaw that stands for the proposition that limiting RRC placement would amount to an atypical hardship. As Defendant argues above, Plaintiff was essentially kept in “the same, minimum-security prison environment with ample services during a portion of her last year in confinement,” which does not amount to an atypical or significant hardship as a matter of law. The Court also agrees that there was nothing atypical about Plaintiff’s work assignment as an “orderly.” To the extent that Plaintiff’s claims that her assignment was “hard labor” due to her health condition, the Court finds that nothing in the record exists showing that Plaintiff required any limitations on her work assignments which could have amounted to significant hardship.

Finally, in its July 10, 2018 Order, the Court has already determined that to the extent Plaintiff’s due process claim is a claim that she had a protected liberty interest in an RRC placement, such a claim would be barred for lack of subject matter jurisdiction. Dkt. 50 at 4 (citing *Olim v. Wakinekona*, 461 U.S. 238, 244-45 (1983) (the law is clear that a prisoner has no constitutional right to be placed in any particular correctional facility, even though the degree of confinement in one facility may be quite different from that in another); *Meachum v. Fano*, 427 U.S. 215, 224-25 (1976) (same); *see also Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976) (holding that discretionary determinations regarding conditions of confinement do not create due process rights). And as mentioned above, the Ninth Circuit has held that district courts do not have subject matter jurisdiction over individualized determinations regarding RRC placements. *See Brown v. Ives*, No. No. 11-56885, 2013 WL 5718528, at **1 (9th Cir. 2013) (citing *Reeb*, 636 F.3d at 1227-28) (affirming dismissal of petition challenging the BOP’s individualized determination concerning petitioner’s placement in an RRC for lack of jurisdiction).

Accordingly, because Plaintiff cannot establish a federal due process claim, Defendant is entitled to judgment as a matter of law as to this claim.

2. Ex Post Facto Claim

In her second amended complaint, Plaintiff alleges Defendant violated her rights under the Ex Post Facto Clause by continuing to deduct restitution payments from her prison salary through the IFRP and forcing her to participate in such a program by using any refusal to do so as a reason to deny her request to be transferred to an RRC. Dkt. 48 at 7-8, 14-15.

1 The United States Constitution provides that “No State shall . . . pass any . . . ex post facto
2 Law.” U.S. Const. art. I, § 10. The Ex Post Facto Clauses are designed to prevent manifestly
3 unjust and oppressive retroactive effects. Specifically, these clauses prohibit the government from
4 enacting laws with certain retroactive effects: any law that (1) makes an act done before the
5 passing of the law, which was innocent when done, criminal; (2) aggravates a crime or makes it
6 greater than it was when it was committed; (3) changes the punishment and inflicts a greater
7 punishment for the crime than the punishment authorized by law when the crime was committed;
8 or (4) alters the legal rules of evidence and requires less or different testimony to convict the
9 defendant than was required at the time the crime was committed. *See Stogner v. California*, 539
10 U.S. 607, 611-12 (2003) (citing *Calder v. Bull*, 3 Dall. 386 (1798)). The first three prohibitions of
11 the Ex Post Facto Clause apply only to “punishment,” whether punishment for an act not
12 punishable at the time it was committed, or “additional punishment to that then prescribed.”
13 *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277,
14 325-26 (1866)).

15 A law violates the ex post facto clause if it: (1) punishes as criminal an act that was not
16 criminal when it was committed; (2) makes a crime's punishment greater than when the crime was
17 committed; or (3) deprives a person of a defense available at the time the crime was committed.
18 *See Cal. Dep't. of Corr. v. Morales*, 514 U.S. 499, 504 (1995); *Collins v. Youngblood*, 497 U.S.
19 37, 42 (1990).

20 Defendant argues that Plaintiff has not and cannot show either element, stating as follows:

21 As an initial matter, the IFRP is a voluntary program intended to
22 encourage sentenced inmates to meet legitimate financial obligations,
23 which include finds, restitution, and other obligations such as child
24 support or outstanding judgments. 28 C.F.R. § 545.10, 545.11(a)(l-
25 5). Thus, the IFRP is not a law that punishes a criminal act. *Collins*,
26 497 U.S. at 41. Further, even if the IFRP were a penal statute, there
27 is no retroactive element to Plaintiff’s claim. In fact, Plaintiff is
28 alleging a practice of continual deductions as opposed to retroactive
deductions. Finally, the IFRP is actually meant to help, not penalize,
prisoners.

Dkt. 60 at 26-27. The Court agrees with Defendant in that Plaintiff cannot show an ex post facto
violation because the IFRP is not a penal statute. *See Morales*, 514 U.S. at 505 (ex post facto

1 clause pertains exclusively to penal statutes). In addition, the Court agrees that there is no
2 retroactive element to Plaintiff's claim. Thus, it seems that Plaintiff has failed to allege an ex post
3 facto violation.

4 However, the Court notes that Plaintiff seems to allege an ex post facto violation based on
5 Defendant's use of her refusal to participate in the IFRP as a reason to deny her request for
6 transfer to an RRC. Defendant also claims that such an argument is "without grounds." Dkt. 60 at
7 27. Defendant points out that "the Ninth Circuit made clear in *Lemione*, consequences from non-
8 participation in IFRP do not infringe on any constitutionally-protected liberty interest." *Id.* (citing
9 *United States v. Lemoine*, 546 F.3d 1049 (9th Cir. 2008); Tews Decl. ¶ 34; 28 C.F.R. § 535.11(d)
10 (stating that while an inmate is free to decline to participate in a financial responsibility program,
11 as it is a voluntary program, that refusal "shall" ordinarily result in a number of consequences in
12 terms of housing and work, among other things)).

13 The Ex Post Facto Clause is not violated by legislation that "impose[s] new requirements
14 on convicted persons if the statute's 'overall design and effect' indicates a 'non-punitive intent.'" "
15 *Rise v. Oregon*, 59 F.3d 1556, 1562 (9th Cir. 1995), overruled on other grounds by *City of
16 Indianapolis v. Edmond*, 531 U.S. 32 (2000) (statute requiring blood samples from sex offenders
17 could be applied to those convicted before its enactment because the purpose of the blood
18 sampling was to create a data bank to assist in the identification, arrest and prosecution of
19 criminals, not to punish the convicted ones). Changes in the conditions of inmates' confinement
20 and denials of privileges are among those matters which every prisoner can anticipate are
21 contemplated by his original sentence to prison.

22 It is precisely because reasonable prison regulations, and subsequent
23 punishment for infractions thereof, are contemplated as part of the
24 sentence of every prisoner, that they do not constitute additional
25 punishment and are not classified as ex post facto. Moreover, since a
prisoner's original sentence does not embrace a right to one set of
regulations over another, reasonable amendments, too, fall within the
anticipated sentence of every inmate.

26 *Jones v. Murray*, 962 F.2d 302, 309-10 (4th Cir. 1992).

27 Here, the IFRP, which is a regulation that encourages inmates voluntarily to make more
28 generous restitution payments than mandated in their respective judgments, does not violate the

1 Ex Post Facto Clause because it does not constitute punishment of the inmates. Therefore, the
2 Court finds that Plaintiff's ex post facto claim fails.

3 Accordingly, Defendant is entitled to summary judgment on this claim.

4 **3. Equal Protection Claim**

5 In her second amended complaint, Plaintiff claims that she was "treated differently from
6 other inmates with similar education and employment experience, without [any] prior conviction,
7 but that the different treatment was not rationally related to a legitimate government interest."
8 Dkt. 48 at 15. Specifically, Plaintiff alleges that she was convicted of securities fraud, *id.* at 3, and
9 that she lost her professional license, *id.* at 5, which indicate that she most likely worked in the
10 financial industry and had a post-graduate degree. Plaintiff alleges that the "other similarly
11 situated inmates, and inmates with homes to go to or with financial support[] from their families
12 were given more than 6-month RRC time." *Id.* at 6. For example, Plaintiff states an inmate
13 named Nicole Song was also a single woman who worked in the financial industry with a post-
14 graduate degree, and Ms. Song received more than a six-month placement in an RRC. *Id.*
15 Plaintiff further claims that another inmate named Yvonne Rowland, who worked in the financial
16 industry with a post-graduate degree, was placed in RRC for more than six months as well. *Id.*
17 Finally, Plaintiff claims that another inmate named Amy Schloemann worked in the financial
18 industry with a post-graduate degree and received an RRC placement of more than six month. *Id.*

19 In its July 10, 2018 Screening Order, the Court determined that Plaintiff was "not alleging
20 a violation of equal protection based on race or another suspect classification," and instead
21 alleging a "class of one" claim. Dkt. 50 at 7.

22 Where state action, or in this case *federal* action, does not implicate a fundamental right or
23 a suspect classification, Plaintiff can establish an equal protection "class of one" claim by alleging
24 facts from which it can be inferred that the state or *federal* actor intentionally treated her
25 differently than other similarly situated persons without a rational basis. *Cf. Gerhart v. Lake*
26 *County Montana*, 637 F.3d 1013, 1020 (9th Cir. 2011) (citing *Village of Willowbrook v. Olech*,
27 528 U.S. 562, 564 (2000) (per curiam)). The intent element does not require that the government
28 actors acted with "subjective ill will" towards the plaintiff, merely that they intended to treat the

1 plaintiff differently. *Gerhart*, 637 F.3d at 1022 (citing *Willowbrook*, 528 U.S. at 565). Similarly,
2 the rational basis must exist, not for the government's underlying action, but for treating the
3 plaintiff differently. *Id.* at 1023 (rational basis for denial of permit not relevant; there must also be
4 rational basis for denying permit to plaintiff but not to other similarly situated property owners).

5 The plaintiff may pursue a “class of one” claim by raising a triable issue of fact as to
6 whether the defendants’ asserted rational basis was merely a pretext for differential treatment.
7 *Squaw Valley Development Co. v. Goldberg*, 375 F.3d 936, 945-46 (9th Cir. 2004), *overruled on*
8 *other grounds*, *Action Apt. Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1025 (9th
9 Cir.2007). Some governmental actions are by their nature discretionary, however, involving a
10 “vast array of subjective, individualized assessments.” *Engquist v. Oregon Dep’t of Agric.*, 553
11 U.S. 591, 603 (2008). In such cases it is not a violation of equal protection when one person is
12 treated differently from other, because doing so is an accepted consequence of the discretion
13 granted. *Id.*

14 Defendant argues that Plaintiff’s equal protection claim fails, stating as follows:

15 Here, Plaintiff cannot allege a cognizable “class of one” equal
16 protection claim because the RRC determination made by the BOP is,
17 by statute, an individualized assessment of an inmate based on a
18 number of subjective criteria. *See* 18 U.S.C § 3624(c) (requiring
19 individualized determinations of each inmate)[FN 6]; *see also* 18 U.S.C.
20 § 3621(b) (stating the five statutorily-required criteria). Indeed, the
21 length of Plaintiff’s RRC placement recommendation was based on
22 consideration of statutorily-required factors and other factors by the
23 Plaintiff’s Unit Team, and these factors were placed in the context of
24 Plaintiff’s own circumstances, without regard for any other inmate’s
25 circumstances. *See* Compl. at Ex. 1 p. 11 (showing the notes from the
26 Unit Team’s assessment about Plaintiff); *see also* Compl. at Ex. 4
27 (Defendant’s response to Plaintiff’s request for administrative
28 remedy, noting the “Unit Team’s individualized determination
regarding [Plaintiff’s] RRC placement”). Likewise, Defendant’s
review of Plaintiff’s Unit Team’s RRC determination for Plaintiff had
nothing to do with a comparison between her and other inmates. *See*
id. at ¶¶ 11-30. Defendant states that because the determination was
individualized, the Unit Team did not, at any time, “line up the
paperwork for a number of inmates and make each of their RRC
placement decisions in comparison to the others’ RRC placement
decisions.” *Id.* at 30. Notably, this Court does not have the power to
review the outcome of an individualized assessment made by the
BOP. *See Ives*, 543 Fed. Appx. at 637 (“Insofar as [Petitioner] is
challenging the BOP’s individualized determination concerning his
placement, the district court properly concluded that it lacked
jurisdiction over the petition”).

1 [FN 6]: 18 U.S.C. § 3624(c) specifically requires that the BOP make
2 individualized assessments under § 3621(b), providing:
3

4 (6) Issuance of regulations. -- The Director of the Bureau of Prisons
5 shall issue regulations pursuant to this subsection not later than 90
6 days after the date of the enactment of the Second Chance Act of
7 2007, which shall ensure that placement in a community correctional
8 facility by the Bureau of prisons is --

9 (A) conducted in a manner consistent with section 3621(b) of this
10 title;
11 (B) *determined on an individual basis*; and
12 (C) of sufficient duration to provide the greatest likelihood of
13 successful reintegration into the community.

14 Dkt. 60 at 28-29 (emphasis in original). Thus, Defendant argues the Court should enter judgment
15 in their favor on Plaintiff's equal protection claim because the Unit Team's RRC determinations
16 fall outside of a viable class-of-one claim. *See id.*

17 The Court agrees with Defendant. Plaintiff's allegedly disparate treatment (based on the
18 Unit Team's RRC determination) was the result of discretionary decision-making, and the Ninth
19 Circuit has held that the "class of one" theory is not cognizable with regard to discretionary
20 actions. *See Towery v. Brewer*, 672 F.3d 650, 660 (9th Cir. 2012) (citing *Engquist*, 553 U.S. at
21 603). In *Towery*, two inmates with impending execution dates moved for a preliminary injunction
22 against the Arizona Department of Corrections' use of its current lethal-injection protocol on the
23 ground that, among other things, the plaintiffs are each "a 'class of one,' and that the protocol
24 allows the [Arizona Department of Corrections] Director to treat [them] differently from others
25 similarly situated with no rational basis for doing so." *Towery*, 672 F.3d at 660-61. The district
26 court denied the preliminary injunction. *Id.* The Ninth Circuit affirmed as follows:

27 The class-of-one doctrine does not apply to forms of state action that
28 "by their nature involve discretionary decisionmaking based on a vast
array of subjective, individualized assessments." *Engquist v. Oregon*
Dep't of Agric., 553 U.S. 591, 603, 128 S. Ct. 2146, 170 L.Ed.2d 975
(2008). "In such cases," the Court noted,

29 the rule that people should be 'treated alike, under like
30 circumstances and conditions' is not violated when one person
31 is treated differently from others, because treating like
32 individuals differently is an accepted consequence of the
33 discretion granted. In such situations, allowing a challenge
34 based on the arbitrary singling out of a particular person would
35 undermine the very discretion that such state officials are
36 entrusted to exercise.

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Id.

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Here, decisions on matters such as which drug protocol to use, which people to select for the execution team, and whether to use a central femoral IV are, under Arizona's statutory scheme, relegated to the Director, with no State law requirement that there be uniformity. Ariz. Rev. Stat. § 13–757(A). Absent any pattern of generally exercising the discretion in a particular manner while treating one individual differently and detrimentally, there is no basis for Equal Protection scrutiny under the class-of-one theory.

Towery, 672 F.3d at 660-61.

In the instant matter, the record reflects that Plaintiff's six-month RRC placement recommendation was based on consideration of statutorily-required factors, and Defendant's review of Plaintiff's Unit Team's RRC determination for Plaintiff had nothing to do with a comparison between her and other inmates. *See* Dkt. 1, Ex. 4; Tews Decl. ¶¶ 11-30. Accordingly, the Court concludes, pursuant to *Engquist* and *Towery*, Plaintiff does not have a cognizable "class of one" equal protection claim against Defendant under these circumstances. Therefore, Defendant is entitled to summary judgment on this claim.

C. Qualified Immunity

The defense of qualified immunity protects "government officials . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The rule of "qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). The defendants can have a reasonable, but mistaken, belief about the facts or about what the law requires in any given situation. *Id.* at 205. A court considering a claim of qualified immunity must determine whether the plaintiff has alleged the deprivation of an actual constitutional right and whether such right was clearly established such that it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (overruling the sequence of the two-part test that required determining a deprivation first and then deciding whether such right was clearly established, as required by *Saucier*). The court may exercise its discretion in deciding

1 which prong to address first, in light of the particular circumstances of each case. *Pearson*, 555
2 U.S. at 236.

3 Defendant argues that he is entitled to qualified immunity because Plaintiff cannot
4 establish violation of any constitutional rights. As discussed above, there is no evidence that
5 Defendant violated Plaintiff's constitutional rights. However, assuming arguendo that there was a
6 constitutional violation, Defendant would be entitled to qualified immunity against liability from
7 civil damages because Plaintiff has not shown that Defendant's conduct was unlawful from the
8 perspective of a reasonable prison official in Defendant's situation. Specifically, it would not have
9 been clear to a reasonable prison official placed in Defendant's position that his review and
10 agreement with Plaintiff's Unit Team's RRC determination of a six-month placement for Plaintiff
11 would be considered unlawful. *See Saucier*, 533 U.S. at 201-02.

12 Accordingly, Defendant is entitled to qualified immunity.

13 **IV. CONCLUSION**

14 For the foregoing reasons, the Court GRANTS Defendant's motion for summary
15 judgment.⁸ Dkt. 60. The Clerk of Court shall terminate all pending motions and close the file.

16 This Order terminates Docket No. 60.

17 IT IS SO ORDERED.

18 Dated: March 28, 2019

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20 
21 YVONNE GONZALEZ ROGERS
22 United States District Judge
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8 The Court's finding that Defendant is entitled to summary judgment as a matter of law on Plaintiff's claims obviates the need to address Defendant's alternative arguments in support of his motion for summary judgment or his motion for judgment on the pleadings.